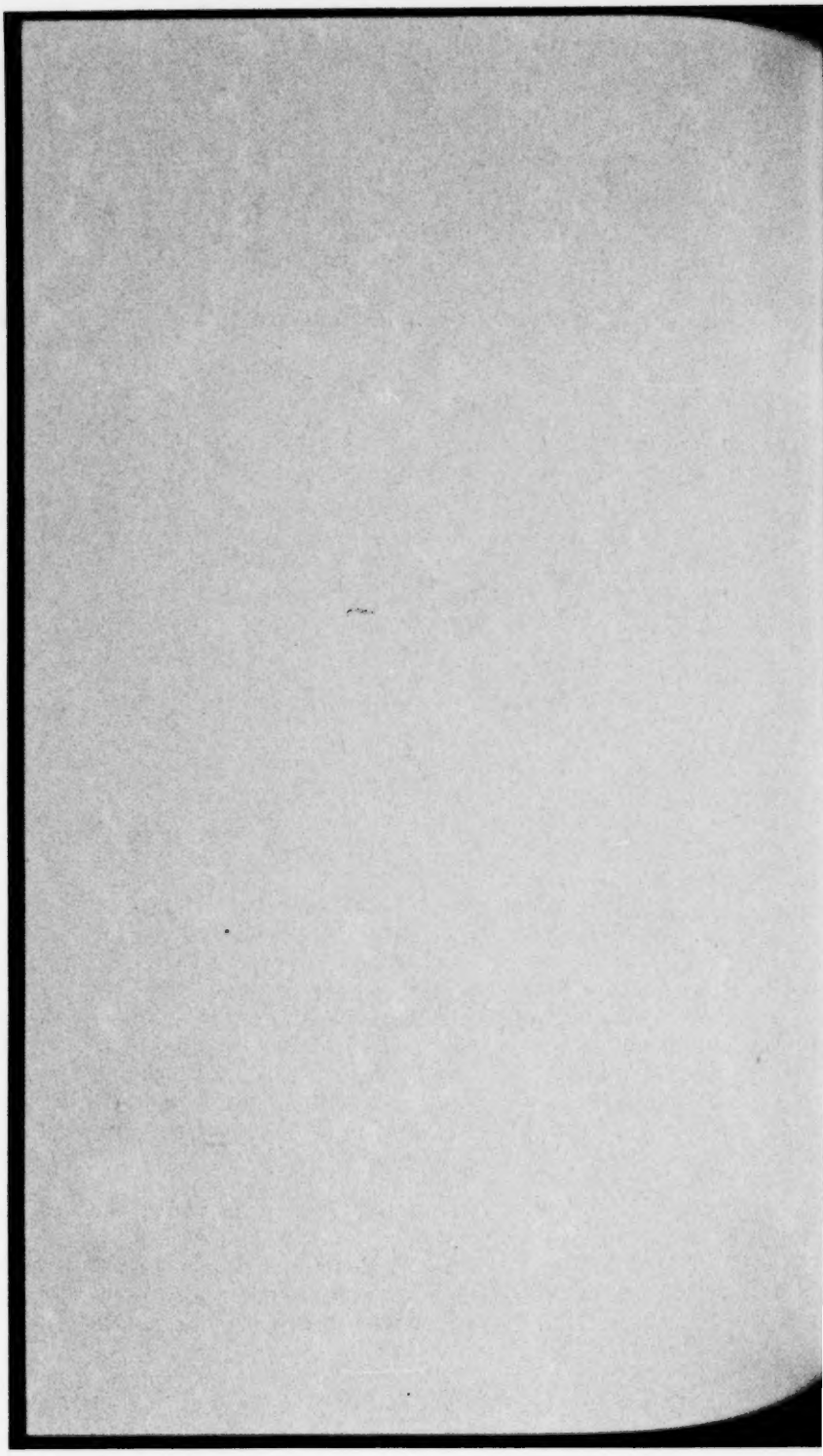

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APPENDIX.

I. Statutes and Rules Involved.

Statutes.

Title 40, U. S. C.

"§304c. Leasing Additional space; assignment to agency; payment.

"The Administrator of General Services is authorized to procure space by lease, on such terms and for such period not in excess of five years as he may deem in the public interest, for the housing of any Federal agency or agencies outside of the District of Columbia, except the Post Office Department, and to assign and reassign such space. To the extent that the appropriations of the General Services Administration not otherwise required are inadequate therefor, the Administrator of General Services may require each Federal agency to which leased space has been assigned to pay promptly by check to the Administrator of General Services out of its available appropriations, either in advance or during occupancy of such space, all or part of the estimated cost of rent, repairs, alterations, maintenance, operation, and moving: *Provided*, That when space in a building is occupied by two or more agencies, the Administrator of General Services shall determine and equitably apportion rental, operation, and other charges on the basis of the total amount of space so leased. Aug. 27, 1935, c. 744 §3, 49 Stat. 886; July 18, 1940, c. 635, §3, 54 Stat. 765; June 14, 1946, c. 404, §4, 60 Stat. 257; June 30, 1949, c. 288, Title I, §103, 63 Stat. 380."

"§ 257. Condemnation of realty for sites and other uses.

In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate

for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice. Aug. 1, 1888, c. 728, § 1, 25 Stat. 357; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; June 25, 1948, c. 646, § 6, 62 Stat. 986."

"§258a. Same; lands, easements, or rights-of-way for public use; taking of possession and title in advance of final judgment; authority; procedure

"In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

"(1) A statement of the authority under which and the public use for which said lands are taken.

"(2) A description of the lands taken sufficient for the identification thereof.

"(3) A statement of the estate or interest in said lands taken for said public use.

"(4) A plan showing the lands taken.

"(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons en-

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titled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. Feb. 26, 1931, c. 307, §1, 46 Stat. 1421."

Federal Rules of Civil Procedure.

"Rule 52. Findings by the Court.

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b)."

"Rule 61. Harmless Error. No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

"Rule 71A. Condemnation of Property.

"(a) The Rules of Civil Procedure for the United States District Courts govern procedure for the condemnation of real and personal property under the

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power of eminent domain except as otherwise provided in this rule."

* * * * *

"(e) Appearance or Answer. If a defendant has no objection or defense to the taking of his property, he may serve notice of appearance designating the property in which he claims to be interested. Thereafter he shall receive notice of all proceedings affecting it. If a defendant has any objections or defense to the taking of his property, he shall serve his answer within 20 days after the service of notice upon him. The answer shall identify the property in which he claims to have an interest, state the nature and extent of the interest claimed, and state all his objections and defenses to the taking of his property. A defendant waives all defenses and objections not so presented, but at the trial of the issue of just compensation, whether or not he has previously appeared or answered, he may present evidence as to the amount of the compensation to be paid for his property, and he may share in the distribution of the award. No other pleading or motion asserting any additional defense or objection shall be allowed."

"Rule 18. Joinder of Claims and Remedies.

"(a) Joinder of Claims. The plaintiff in his complaint or in a reply setting forth a counter-claim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20 and 22 are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 13 and 14 respectively are satisfied."

"Rule 13. Counterclaim and Cross-Claim.

"(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any

opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

"(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

* * * * *

"(g) Cross-Claim Against Co-Party. A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant."

* * * * *

"(i) Separate Trials; Separate Judgment. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of."

"Rule 42.

"(b) Separate Trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues."

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II. Findings of Fact and Conclusions of Law Entered by the United States District Court for the Northern District of Illinois, Eastern Division, on June 25, 1953.

A. *Findings of Fact* (R. 1077-1084).

FINDINGS OF FACT.

1. Merchants Matrix Cut Syndicate, Inc., was, on June 22, 1951, in lawful and peaceable possession of approximately 10,000 square feet of space on the eighth floor of the Rand McNally Building, 536-538 South Clark Street, Chicago, Illinois, under and by virtue of two certain leases, one from Rand McNally & Company, dated May 19, 1949, for a period beginning on June 16, 1949, and ending August 31, 1953, and the other from Clark-Congress Corporation, dated April 27, 1951, for a period commencing May 1, 1951, and ending August 31, 1953.

Intertype Corporation was on June 22, 1951, in lawful and peaceable possession of approximately 10,742 square feet of space on the tenth floor of said Rand McNally Building under and by virtue of a ten-year lease from Rand McNally & Company, dated November 19, 1948, for a term commencing January 1, 1949, and expiring December 31, 1958.

The Advertising Checking Bureau, Inc., was, on June 22, 1951, in lawful and peaceable possession of approximately 20,000 square feet of space, comprising the south half of the eighth floor of said Rand McNally Building under a lease from Clark-Congress Corporation dated February 10, 1950, for a term of five years, commencing on May 1, 1950, and expiring on April 30, 1955.

2. Clark-Congress Corporation, having on June 30, 1949, acquired the landlord's interests in the Merchants Matrix Cut Syndicate, Inc., lease dated May 19, 1949, and

in the Intertype Corporation lease, occupied the position of landlord with respect to Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., under each and all of the aforesaid leases during the period here in controversy.

3. Clark-Congress Corporation on June 22, 1951, entered into a written lease with the United States of America, acting by and through the General Services Administration, in form and substance as contained in a certain exhibit variously referred to as Cross-Claimants' Exhibit 2 and Intertype's Exhibit 1.

4. Following the execution of said lease, Clark-Congress Corporation between the period from June 22, 1951, and to and including December 31, 1951, permitted the United States Government, the General Services Administration, and their employees, agents, and servants, including contractors, subcontractors and laborers engaged in remodeling of the building, free and unlimited access to the building and acquiesced in and permitted such persons to knock down walls, tear out partitions, create dust, noise and disturbance throughout the building, usurp and interfere with elevator service, toilets, corridors and other services used by the tenants, interfere with and interrupt electrical, steam, and other utilities furnishing light and power to tenants, and by correspondence and unlawful demands for possession to harass and disturb tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., and generally to interfere with and disturb the orderly and normal operation of the building which the tenants in possession were entitled to under their leases then in force.

5. Clark-Congress Corporation, its employees and agents, were in control of the building during said period from June 22, 1951, to December 31, 1951, were in the building constantly or at frequent intervals, and knew, or must

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be deemed to have known, what was occurring by reason of the Government's actions, and indeed acquiesced in and participated in a concerted effort to force or induce the tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., to vacate or abandon the building and to surrender their leases, notwithstanding the fact that said leases were in full force and effect and that the Merchants Matrix Cut Syndicate leases had approximately two years to run, the Intertype Corporation lease had more than seven years to run, and The Advertising Checking Bureau, Inc., lease nearly four years to run.

6. Clark-Congress Corporation in fact co-operated with the United States Government and the General Services Administration to secure cancellations and terminations of leases in accordance with the provisions of its lease of June 22, 1951.

7. It is apparent from the evidence and the lease of June 22, 1951, that a definite and wilful plan and intention existed and was carried out by the joint and combined efforts of Clark-Congress Corporation, the United States Government, the General Services Administration, and their respective employees, agents and servants to rid the Rand McNally Building of all or substantially all tenants as soon as possible after June 22, 1951 to secure possession of the space occupied, respectively, by Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., prior to January 1, 1952, and to secure substantially complete possession of the entire building for the Government on or about January 1, 1952, in so far as their combined efforts could bring this about.

8. It is apparent from the provisions of the lease and from the evidence in this case that the president of Clark-Congress Corporation knew or must be held to have known

the nature and extent of the alteration work that was to be undertaken in the building at the time the lease of June 22, 1951, was entered into, and that he also knew or must be held to have known that the Bureau of Public Debt wanted occupancy of the entire building as soon as possible.

9. It is apparent from the provisions of the lease of June 22, 1951, and from the evidence in this case, that Clark-Congress Corporation, its agents, employees and servants knew, or must be held to have known the nature and extent of the alterations and reconstruction that were being undertaken in the building between the period from October 3, 1951, to December 31, 1951, and thereafter, and that Clark-Congress Corporation, its servants and agents, acquiesced in, sanctioned, condoned and consented to the actions of the Government, its employees and servants, in their operation in the building.

10. Except for the collaboration and co-operation of Clark-Congress Corporation in entering into the lease of June 22, 1951, and thereafter in negotiating with other tenants of the building for and procuring the cancellation and termination of various valid leases, the Government would not have been in position to commence and carry on alterations and reconstruction of the building in October, November and December of 1951, in the manner shown by the evidence; that such alterations and reconstruction resulted in creating excessive dust, noise, and other disturbances, interference with the elevator, electrical, steam and other services, obstruction of corridors and of the courtway and loading facilities of the Rand McNally Building.

11. The failure of Clark-Congress Corporation to interfere with, complain about, or protect the tenants against, the actions of the Government in the alteration and reconstruction work, and the letters from the General Services Administration demanding that the tenants, including

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Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., remove from the building, was a breach of the landlord's duty of furnishing to its tenants under continuing leases protection against interference and disturbance by third parties of their tenancies.

12. Clark-Congress Corporation, in accordance with the terms of its lease to the Government, did certain acts of its own to interfere with the tenancy of Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., including curtailment of services and letting the Government tear down walls in spaces as to which Clark-Congress was still the landlord, and also co-operated with the General Services Administration in encouraging and permitting undue interference with the tenancies of said three tenants, and authorized and ratified certain acts done by the General Services Administration in alteration and reconstruction of the building, and in all of these actions was a joint tortfeasor with the General Services Administration.

13. Clark-Congress Corporation did nothing to check or stop the interference with the tenancies of Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., and must be deemed to have co-operated therein as provided in the lease and to this extent likewise breached its duties of quiet enjoyment to Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc. and other tenants in possession.

14. In connection with this co-operative effort, to rid the building of its tenants it was contemplated, as shown by the lease of June 22, 1951, that if necessary the Government would use its powers of eminent domain as against recalcitrant tenants and Clark-Congress Corporation, in signing said lease, authorized and acquiesced in the use of

condemnation proceedings against its tenants if such was necessary to secure actual possession.

15. The acts of Clark-Congress Corporation and of the United States of America in the Rand McNally Building, during the period from June 22, 1951, to December 31, 1951, were far above and beyond the usual and ordinary remodeling that customarily goes on in a building of this type, and did in fact harass, disturb and interfere materially and abnormally with existing tenancies and with the use and occupancy of their spaces by Merchants Matrix Cut Syndicate, Inc., Intertype Corporation, and The Advertising Checking Bureau, Inc., and created great noise, dust, confusion, uncertainty and unrest among the employees of said tenants, as well as very material disturbance of said tenants' comfort and business.

The excessive dust, noise, and other disturbances, interference with the elevator, electrical, steam and other services, obstruction of corridors and of the courtway and loading facilities of the building caused by the alteration and reconstruction of the building during the months of October, November and December, 1951, disturbed Merchants Matrix and its possession of the premises under lease to it and rendered the premises unfit for occupancy for the purposes for which Merchants Matrix had leased and occupied them and deprived Merchants Matrix of the beneficial enjoyment of the premises by unduly interfering with its normal business operations and caused Merchants Matrix to abandon the premises. The nature of the business carried on by Merchants Matrix on its premises in the Rand McNally Building and the facilities required to operate its business were such that Merchants Matrix was unable to find rental quarters providing adequate facilities to which to move, and that Merchants Matrix moved out of said Rand McNally Building as soon as the partially completed factory building purchased by it, when

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it was forced to abandon its space in the Rand McNally Building, was completed, and that said moving was within a reasonable time of the disturbance of its possession and enjoyment of the premises.

A hole was knocked through the walls of Intertype's space while it was in lawful possession thereof during the process of demolition of adjoining space.

Some of the demolition work done during this period was in the space adjoining the space occupied by The Advertising Checking Bureau, Inc., and in space on the ninth floor directly above the space occupied by The Advertising Checking Bureau, Inc. The noise caused by such demolition work was so great that often it was necessary for officers and employes of this tenant to discontinue telephone conversations and advise the caller that the person talking would call back when the noise lessened. This noise also made it impossible for this tenant to use Ediphone dictating machines in its space. As of November 10, 1951, the position of The Advertising Checking Bureau, Inc., as a tenant in the space occupied by it became intolerable, and on that day it determined that its rights as a tenant were being disregarded, and it decided to remove from the Rand McNally Building as soon as possible. In implementation of that decision, it immediately (a) negotiated for and obtained office space in Columbus, Ohio, and removed a portion of the files from the Chicago office to the Columbus office, and (b) stepped up its efforts to purchase the William Building located at 205 West Monroe Street, Chicago, Illinois.

16. As a result of the foregoing, Merchants Matrix Cut Syndicate, Inc., has suffered actual damages in the amount of $44,027.91, as follows:

Cost of moving machinery and equipment, office furniture, etc., including cost of breaking wall	$ 9,877.88

Cost of electrical work in moving and relocation	14,649.62
Cost of pipe fitting work in moving and relocation	5,094.94
Cost re electric typewriters	302.27
Cost of parts and conversion of Lake Erie Presses	3,443.00
Value of air conditioning equipment and lighting fixtures destroyed	3,070.26
Extra overtime paid due to interferences with possession and moving	7,589.94
Total damages	$44,027.91

As a result of the foregoing, Intertype Corporation has suffered actual damages in the sum of $41,498.98, as follows:

Cost of moving out	$16,141.05
Compensation to executives for special work during moving	2,103.00
Salary of employees engaged in removal	6,641.55
Loss of profits during the two week period when business was suspended because of moving	16,500.00
Miscellaneous out-of-pocket expense	113.38
	$41,498.98

As a result of the foregoing, The Advertising Checking Bureau, Inc., has suffered actual damages in the sum of $96,949.78, as follows:

Cost of moving machinery, equipment, office furniture, supplies and electrical work	$16,653.61
Extra overtime cost due to moving	1,169.73
Time lost on over-all help	562.50
Cost of carpenter work and materials	1,388.92
Cost of reprinting envelopes, new die cuts and new printed forms	3,355.24
Miscellaneous cash expenses in connection with moving	62.75

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Losses incurred or additional expenses suffered by removing to new location as follows: Additional cost of truck operation 1½ hours per day at $3.00 per hour for man and truck, 300 days per year for 3 years, 1 month, 20 days	4,237.50
Additional cost because of lack of parking facilities at 18 S. Michigan Ave., $20 per month for 3 years, 1 month, 20 days	753.33
Additional cost of handling extra requests caused by later pickup of incoming express and earlier cutoff on outgoing mail and express, 1800 hours per year at $1.25 per hour, for 3 years, 1 month, 20 days ..	7,062.50
Cost of toilet paper, $120 per year for 3 years, 1 month, 20 days	376.67
Cost of window cleaning, $12 per month to January 1, 1953, and $14 per month after January 1, 1953, for 3 years, 1 month, 20 days	443.33
Costs of janitor service, 1 janitor at $46.00 per week and 1 janitor at $30.00 per week for 3 years, 1 month, 20 days	12,404.87
Costs of cutting new stencils, running Mimeograph forms and making changes in advertising plates	280.59
Fair market value of leasehold estate over and above rent reserved, $.717 per square foot, 19,360 square feet, for 3 years, 5 months, 20 days	48,198.24
	$96,949.78

B. *Conclusions of Law* (R. 1085-1088).

CONCLUSIONS OF LAW.

1. The court has jurisdiction of the subject matter of this cause and of the parties hereto.

2. Clark-Congress Corporation, as landlord, owed to Merchants Matrix Cut Syndicate, Inc., Intertype Corpora-

tion and The Advertising Checking Bureau, Inc., as its lessees of certain spaces in the Rand McNally Building, the duty of permitting said tenants to occupy said spaces during the full term of their leases without harassment, annoyance or undue interference with their occupancy and without undue interference or deprivation of the services afforded to them in said premises.

3. While Clark-Congress Corporation, as landlord, had the right and privilege of leasing other space in the building to the Government, or anyone else, subject to the existing leases to Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., and subject to existing leases to other tenants, it did not have the right to enter into the lease of June 22, 1951, demising to the Government the actual spaces occupied by Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., for a term covered by the terms of the existing leases held by Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., on the same spaces.

4. The provision that the Government lease was subject to the Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., leases was not a bona fide provision, and the lease, on its face, clearly shows that, at the time of making thereof, it was contemplated both by the Government and Clark-Congress Corporation that by one means or another the Government would end and terminate the right of Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., to occupy their said spaces at the earliest practicable date. The letters sent to Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., by the Government fix that date as of November 1, 1951.

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5. Except by the collaboration and co-operation of Clark-Congress Corporation in entering into the lease of June 22, 1951, and thereafter in assisting the Government in the procural of termination of various leases, the Government would not have been in position to harass and press Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., for the spaces lawfully occupied by them respectively under their leases.

6. The cross-defendant Clark-Congress Corporation is charged by law with the natural consequences of its acts.

7. When the landlord (Clark-Congress Corporation) authorizes one tenant (United States of America) to do upon the premises (Rand McNally Building) acts (program of demolition and alteration) whose natural consequences are to injure other tenants (Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc.) there is a constructive eviction.

8. The action of Clark-Congress Corporation, in affording to the Government free and complete access to all parts of the building, to interfere with the elevator service, to alter and eliminate toilet facilities, to interfere with electrical and other services, to eliminate and obstruct corridors and other public parts of the building, was an unlawful breach of the landlord's duty to afford the tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., the peaceful and quiet enjoyment of the spaces occupied by the tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc.

9. The actions of the Government, the General Services Administration, their employees, agents and servants in the Rand McNally Building during the period from June 22 to

December 31, 1951, and the engagement in the general interior and structural remodeling of the building were acts done under and in pursuance of the authorities given them by virtue of the lease of June 22, 1951, and contemplated by the parties thereto and are by reason of such authority, and the acquiescence of Clark-Congress therein, to be regarded as the acts of Clark-Congress Corporation and it is jointly and severally responsible therefor.

10. The failure of Clark-Congress Corporation to interfere with, complain about, or protect the tenants against the actions of the Government, and the letters from the General Services Administration demanding that the tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., remove from the building, was a breach of the landlord's duty of furnishing to its tenants under continuing leases protection against interference and disturbance by third parties to their tenancies.

11. Clark-Congress Corporation, in accordance with its lease to the Government, co-operated with the Government in permitting this interference and, in any event, did nothing to check or stop the interferences and must be deemed to have co-operated therein, as provided in their lease, and to this extent likewise breached its duties of quiet enjoyment to Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., and other tenants affected thereby.

12. The action of Clark-Congress Corporation in permitting the Government, its servants and agents, to approach, negotiate with and make demands for possession on tenants having unexpired leases was likewise an interference with the rights of quiet enjoyment of the respective tenants, including Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc.

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13. Such acts by Clark-Congress Corporation and the Government acting with the sanction, acquiescence and consent of Clark-Congress constitute an affirmative and wrongful breach of duty by Clark-Congress Corporation and entitle Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., and each of them, as tenants of Clark-Congress Corporation under valid and existing leases, to compensation for the damages suffered by them, respectively, as results of these wrongful actions.

14. Merchants Matrix Cut Syndicate, Inc., Intertype Corporation and The Advertising Checking Bureau, Inc., and each of them, is entitled to recover from Clark-Congress Corporation for all the injury they have sustained by reason of the wrongful acts of Clark-Congress Corporation, including the fair market value of their respective leases as of the date of constructive eviction for the remainder of the term over and above the rent reserved. The date of constructive eviction of The Advertising Checking Bureau, Inc., is November 10, 1951. The fair market value of the lease of The Advertising Checking Bureau, Inc., is found to be in the amount of $48,198.24; the fair market values of the leases of Intertype Corporation and Merchants Matrix Cut Syndicate, Inc., have previously been determined by the jury in this case.

15. The uncontradicted evidence in this case shows that Merchants Matrix Cut Syndicate, Inc., has suffered actual damages in the amount of $44,027.91 by reason of the wrongful acts of Clark-Congress Corporation.

The uncontradicted evidence in this case shows that Intertype Corporation has suffered actual damages in the amount of $41,498.98 by reason of the wrongful acts of Clark-Congress Corporation.

The uncontradicted evidence in this case shows that

The Advertising Checking Bureau, Inc., has suffered actual damages in the amount of $96,949.78 by reason of the wrongful acts of Clark-Congress Corporation.

Enter this 25th day of June, 1953.

John P. Barnes,
Judge.

III. Instructions to the Jury Given by Hon. John P. Barnes, Judge of United States District Court for the Northern District of Illinois, Eastern Division, on January 28, 1953 (R. 549-556).

By the Court: Ladies and Gentlemen of the Jury, you will now be given the law in this case.

You are the sole judges of the credibility of the witnesses. It is your duty to determine where lies the preponderance, that is, the greater weight of evidence in this case. The preponderance of evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is, you may take into consideration the number of witnesses testifying to a particular fact or state of facts; and you may also take into consideration, so far as shown by the evidence, the opportunities of the several witnesses for seeing, knowing and understanding the things about which they testify, their apparent intelligence or lack thereof; their appearance, conduct and demeanor while testifying, their interest or lack of interest, if any, as shown by the evidence, in the result of the suit; the probability or improbability of the truth of their several statements, in view of all the evidence, facts and circumstances proved on the trial; and from all these facts and circumstances, and from a full

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consideration of all the evidence, determine upon which side is the greater weight or preponderance of the evidence.

Each and all of you have solemnly sworn that you will well and truly ascertain and report just compensation to the owner of the property taken according to the facts in the case as the same might be made to appear from the evidence, and that you would truly report such compensation so ascertained. You may not disregard this oath. It is as binding upon you now as it was then, and you should follow it in reaching your decision.

You should not be swayed by emotion, prejudice, sympathy or any appeals to your feelings. You should not be swayed in any way by the question of the source of the money necessary to pay for the property taken.

Your verdict must be based upon the evidence admitted in this case.

You are instructed that every element of value which would be taken into consideration between private parties in the leasing of property should be considered in a proceeding of this character in arriving at a just compensation for the leaseholds taken, but in so doing the value fixed by the jury must be in accordance with the evidence introduced herein and the instructions of the Court.

It is the duty of the Court to explain to you the issues in this case which you are called upon to determine by your verdict, and to instruct you as to the applicable rules and principles of law by which you must be guided in your deliberation. It is your duty to accept these instructions as correct, and, so far as the law of the case is concerned, be guided by them.

Under the Fifth Amendment to the Constitution of the United States, it is provided that private property shall not be taken for public use without just compensation. You will note that the thing that the private owner is entitled

to when his property is taken for public uses is "just compensation".

The Government of the United States possesses what is known in law as the "power of eminent domain". This means that in the exercise of its lawful powers it has the right to take private property whenever such property is necessary for public use. In the exercise of that power the Government institutes an action which is commonly referred to as a "condemnation proceeding", whereby it acquires title to the property of the individual upon condition that it pay "just compensation" to the owners for the property of which they are deprived.

Private property cannot be appropriated to public uses unless a full and exact equivalent for it be returned to the owner.

That equivalent is the market value of the property at the time of the taking. The owner is entitled to be made "pecuniarily whole," that is, to be paid in money, the full value of that of which he has been deprived.

In this particular case the Government in the exercise of its powers of eminent domain has taken for public purposes certain leaseholds in Chicago, Illinois.

You are instructed that the property of the owner that is involved in this case has been taken in eminent domain proceedings by the United States of America for public use, and the right of the Government so to take it is in no way involved in your deliberations. The owners of the property involved are entitled to just compensation for this taking. You are required to determine the fair cash market value of the property at the time of its taking. The controlling date in this case is December 12, 1951. That is the date when the United States Government took the property. You will determine the market value of the property—that is the leaseholds—as of December 12,

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1951. In theory the taking of and payment of just compensation for private property taken for public use are contemporaneous. You shall accordingly in your verdict make no allowance for interest. Allowances for interest will be made by the Court later.

Fair cash market value means the sum of money for which the property could be leased, if offered for leasing, in an open market by an owner, who is ready, willing and able to lease, to a person who is ready, willing and able to rent, for cash or terms equivalent to cash, within a reasonable time, neither of whom is under any compulsion to lease or rent.

In this case one of the measures of the compensation to be made for the taking of the leasehold interests of Merchants Matrix Cut Syndicate, Inc., and Intertype Corporation is the amount which each leasehold estate, or the space respectively occupied by them in the Rand McNally Building, subject to the terms and provisions of each leasehold, would bring in the market at a fair sale, when the lessee, *i. e.*, the tenant, wanted to sell its lease or space and a purchaser wanted to buy it.

Stated in slightly different language, the measure is the market value of the residue of the term yet to run with reference to the most valuable use or uses to which the space may be put; that is, what would be its present money worth over and above the obligations of the lease, to the lessee or an assignee or purchaser willing and able to assume and perform the obligations of the lease for the residue of the term after January 1, 1952.

In determining the just compensation to which Merchants Matrix Cut Syndicate, Inc., is entitled for the taking of its right to the use and occupancy under its lease you may and should take into consideration the excess value, if any, of the use and occupancy of the premises, considering the condition and situation of the property as

it existed at the time of taking for the period from January 1, 1952 to August 31, 1953, over and above the rental reserved in the lease for that period.

In determining the just compensation to which Intertype Corporation is entitled for the taking of its right to the use and occupancy under its lease, you may and should take into consideration the excess value, if any, of the use and occupancy of the premises, considering the condition and situation of the property as it existed at the time of the taking for the period from January 1, 1952 to December 31, 1958 over and above the rental reserved in the lease for that period.

You are instructed that your view of the premises involved in this case is part of the evidence in this case. In viewing the premises you saw the property as it has been altered by the Government for the Government's use. You will endeavor to eliminate from your view the additions, alterations and repairs which have been made by the Government and to attempt to visualize the property as it was on January 1, 1952.

It has been stipulated and agreed that the just compensation to be awarded in this case to Intertype Corporation shall be on the basis that the balance of the term of the Intertype Corporation lease has been taken in this proceeding. The unexpired term of the Intertype Corporation lease is for the period from January 1, 1952 to December 31, 1958.

The witness, Charles John Stupka, testified to moving cost incurred by Intertype Corporation in the amount of $16,141.05, and additional moving expense of $113.38; salaries of employees engaged in removal, $6,641.55; salary and expenses of executives whose time was required in connection with moving, $2,103.00; loss of profits due to three weeks' stoppage of business, $16,500.00 — a total of $41,498.98.

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You are instructed to disregard all of such expenses as elements in determining the just compensation to which the Intertype Corporation is entitled to by reason of the taking of its leasehold in the Rand McNally Building.

The Jury are further instructed that a leasehold estate such as the lease which Intertype had on space on the tenth floor of the Rand McNally Building is a property interest within the meaning of the Fifth Amendment of the Constitution of the United States which provides that private property shall not be taken for public use without just compensation. That the value of said lease is the value of the right which the tenant Intertype Corporation had to occupy that space during the entire term of the lease in accordance with the provisions of said lease and to carry on its business in that particular location.

The Jury are further instructed that in determining the amount of compensation to be awarded to the defendants Intertype Corporation and Merchants Matrix Cut Syndicate respectively in this case, the value of fixtures and permanent equipment destroyed or depreciated in value by the taking are items for which the respective defendants are entitled to compensation.

The fixtures and equipment such as tenants' trade fixtures are items for which the tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value. They are property distinct from the right of occupancy and such compensation should be awarded not as a part of but in addition to value of the occupancy as such.

The Jury are further instructed that in considering the value of the leasehold space at the time of the filing of the petition for condemnation, the Jury are entitled to consider the rental being paid by the party taking over the space, namely, the General Services Administration representing the United States Government, and in de-

termining the rental paid by the United States Government, to consider not only the cash rental paid by the Government but also the cost as shown by the evidence in this case to the Government of maintaining, operating, altering and remodeling the Rand McNally Building as such costs comprise a definite part of the value being paid to the landlord, Clark-Congress Corporation, by the United States Government as rental for the space taken from Intertype Corporation.

The present money value of a leasehold interest is the present market value as of December 12, 1951 of the residue of the term yet to run from and after January 1, 1952 as with reference to the most valuable use or uses to which the same may be lawfully put; that is, what would be its money worth as of that date over and above the obligations of the lease to a person willing and able to use said space during the balance of the term of the lease and to perform the obligations of said lease for the residue of the term.

The Jury are further instructed that the Government has taken the private property of defendant, Intertype Corporation, namely its right of use and occupancy of the space occupied by it under its lease for a period expiring December 31, 1958 and is accordingly required to pay to defendant, Intertype Corporation, just compensation for such taking. Just compensation means the full and perfect equivalent in money of the property taken, so as to place this defendant in as good position pecuniarily as it would have occupied if its property had not been taken. The ascertainment of that compensation is not controlled by artificial rules or a general formula, but is measured in various ways depending upon the circumstances of each case. In arriving at your verdict of the amount of just compensation to be paid to defendant Intertype, for the taking, you, the Jury, should give proper consideration to

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all the relevant factors appearing in the evidence presented to you.

The Jury are further instructed that in determining the "just compensation" to be awarded to defendant, Intertype Corporation, the Jury may properly take into consideration all evidence tending to show the actual value of the space, the use and occupancy of which this defendant was entitled for the unexpired period of its lease, namely, until December 31, 1958, and of which use and occupancy it has been deprived by the United States Government. The special value of the right of use and occupancy due to its adaptability for use in Intertype's business operation due to the special facilities supplied by the Rand McNally Building is an element which Intertype, as the owner of the right of use and occupancy, is entitled, under the Fifth Amendment of the United States Constitution, to have considered in determining the amount to be paid to Intertype as just compensation upon the taking by eminent domain.

The Jury are further instructed that the Government has taken the private property of defendant, Merchants Matrix Cut Syndicate, namely its right of use and occupancy of the space occupied by it under its lease for a period expiring August 31, 1953, and is accordingly required to pay to defendant, Merchants Matrix Cut Syndicate, just compensation for such taking. Just compensation means the full and perfect equivalent in money of the property taken, so as to place this defendant in as good position pecuniarily as it would have occupied if its property had not been taken. The ascertainment of that compensation is not controlled by artificial rules or a general formula, but is measured in various ways depending upon the circumstances of each case. In arriving at your verdict of the amount of just compensation to be paid to defend-

ant Merchants, for the taking, you, the Jury, should give proper consideration to all the relevant factors appearing in the evidence presented to you.

The Jury are further instructed that in determining the "just compensation" to be awarded to defendant, Merchants Matrix Cut Syndicate, the jury may properly take into consideration all evidence tending to show the actual value of the space, the use and occupancy of which this defendant was entitled for the unexpired period of its lease, namely until September 1, 1953, and of which use and occupancy it has been deprived by the United States Government. The special value of the right of use and occupancy due to its adaptability for use in Merchants' business operation due to the special facilities supplied by the Rand McNally Building is an element which Merchants, as the owner of the right of use and occupancy, is entitled under the Fifth Amendment of the U. S. Constitution, to have considered in determining the amount to be paid to Merchants as just compensation upon the taking by eminent domain.

The Court further instructs the Jury that the defendant, Merchants Matrix Cut Syndicate is entitled to just compensation for the value of the space, the use and occupancy of which, under its lease in evidence in this case, it has been deprived of by the United States Government.

In determining such value the jury should take into consideration the value to Merchants of the space occupied by it by reason of the facilities provided by the Rand McNally Building as shown by the evidence, including the availability of live steam provided by said building; the 24-hour elevator service furnished by said building; the 250 lbs. per square foot of floor load capacity; the DC current for electrical power and light; and such other facilities as appears from the evidence are furnished by said

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building and that the evidence may show are required in the conduct of the business of Merchants.

The Jury are further instructed that in considering the value of the use and occupancy by defendant Merchants Matrix Cut Syndicate of the space, the use and occupancy of which defendant was entitled under its lease of the premises in evidence at the time of the taking of the space by the Government, the jury are entitled to consider the rental being paid by the party taking over the space, namely the General Services Administration representing the United States Government, and in determining the rental paid by the United States Government, the jury should consider not only the cash rental paid by the Government, but also the cost as shown by the evidence in this case to the Government of maintaining, operating, altering and remodeling the Rand McNally Building, as such costs comprise a definite part of the value being paid to the landlord, Clark-Congress Corporation by the United States Government as rental for the space of Merchants Matrix Cut Syndicate.

The Jury are further instructed that the right to use and occupancy of the space occupied by defendant Merchants Matrix Cut Syndicate, under its lease in evidence in this case of space on the 8th floor of the Rand McNally Building is a property interest within the meaning of the Fifth Amendment of the Constitution of the United States, which provides that private property shall not be taken for public use without just compensation to the owner thereof; that the value of such use is the right which the tenant Merchants had to occupy that space during the remaining portion of the period provided in said lease, namely, until September 1, 1953, and to carry on its business in that particular location.

IV. Proceedings in Court of Appeals for the Seventh Circuit, Including Opinion.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Thursday, July 29, 1954.

Before

Hon. Philip J. Finnegan, Circuit Judge

Hon. .....

Hon. .....

INTERTYPE CORPORATION, ET AL.,
Cross-Claimant-Appellees,
No. 11018-19-20 *vs.*
CLARK-CONGRESS CORPORATION,
Cross-Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Motion of the United States to file brief as *amicus curiae* and present oral argument at the hearing of these cases is granted.

Cross-claimants-appellees, Intertype Corporation, Merchants Matrix Cut Syndicate, Inc., and The Advertising Checking Bureau, Inc., pursuant to their consolidated motion, are hereby given leave to file their briefs in reply to the aforesaid *amicus curiae* brief, on or before September 9, 1954.

All requests for allocation of, or additional time for oral arguments will be presented to this Court on or before September 9, 1954.

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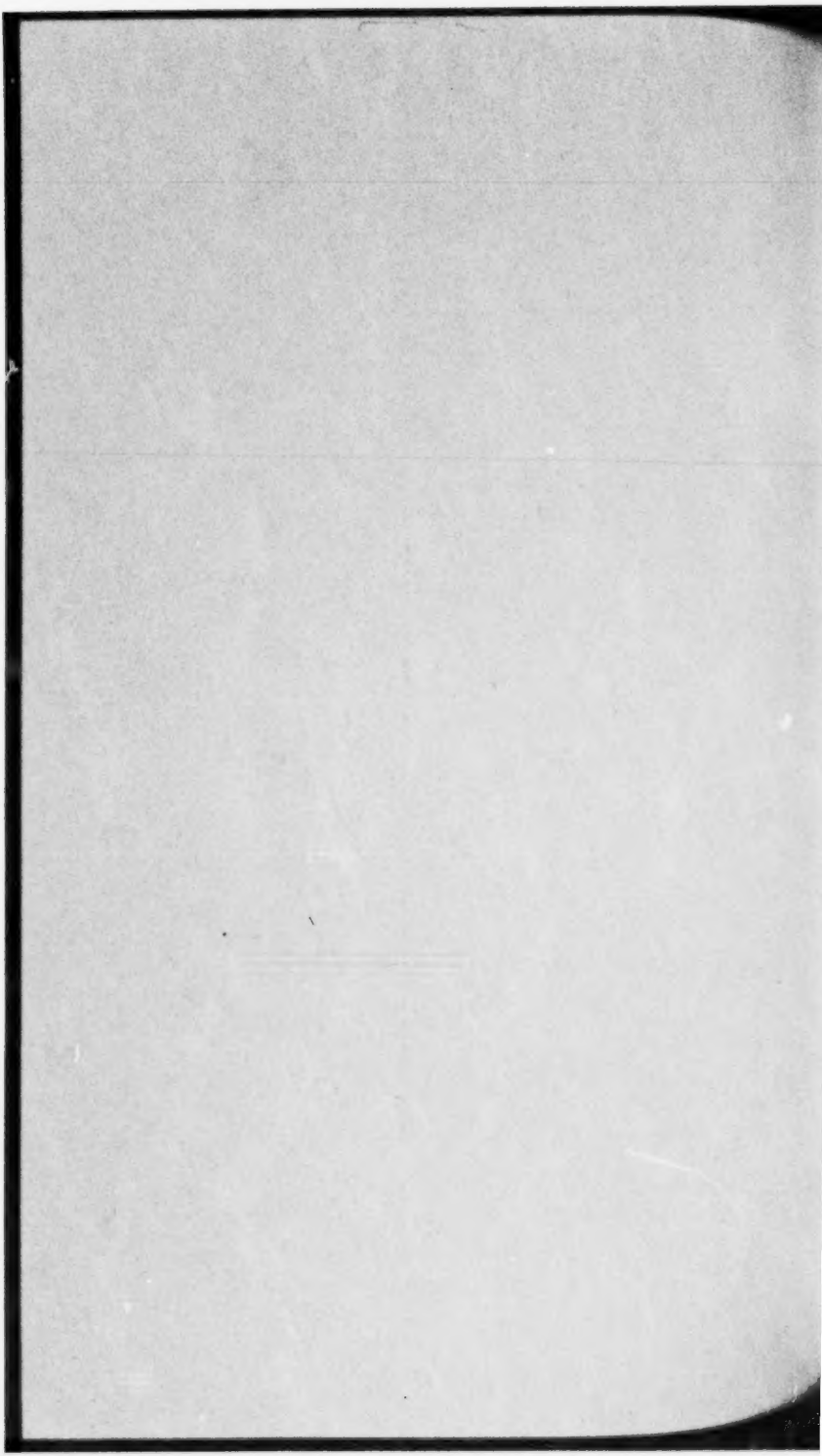
OPINION BELOW



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IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

OCTOBER TERM AND SESSION, 1954.

No. 11017.
THE UNITED STATES OF AMERICA,
Plaintiff-Appellant,
vs.
MERCHANTS MATRIX CUT SYNDICATE, INC., and INTERTYPE CORPORATION,
Cross-Claimants-Appellees.

No. 11018.
INTERTYPE CORPORATION,
Cross-Claimant-Appellee,
vs.
CLARK-CONGRESS CORPORATION,
Cross-Defendant-Appellant.

No. 11019.
MERCHANTS MATRIX CUT SYNDICATE, INC.,
Cross-Claimant-Appellee,
vs.
CLARK-CONGRESS CORPORATION,
Cross-Defendant-Appellant.

No. 11020.
THE ADVERTISING CHECKING BUREAU, INC.,
Cross-Claimant-Appellee,
vs.
CLARK-CONGRESS CORPORATION,
Cross-Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

January 17, 1955.

Before FINNEGAN, LINDLEY and SWAIM, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Condemnation proceedings[1] involving leasehold interests, are here reviewed under the Government's notice of appeal, and three such notices filed by Clark-Congress Corporation. After judgment was entered, January 29, 1953, on jury verdicts of compensation for taking by eminent domain, the Government moved for a new trial and, in the alternative, for judgment notwithstanding verdicts under Rule 50(b), Fed. R. Civ. Proc., 28 U.S.C.A. Clark-Congress, on the other hand, seeks reversal of a final judgment entered January 26, 1953 against it on two cross-claims and a counterclaim, prosecuted by its three co-defendants. Under these latter three notices of appeal, findings of fact and conclusions of law made by the trial judge, on this aspect of the case, are brought up for our examination.

Prior to any proceedings, now under scrutiny, Clark-Congress acquired five ground leases[2] of land in Chicago, Illinois, on which the Rand McNally Building is situated. Initially, Merchants Matrix Cut Syndicate, Inc., and Intertype Corporation were tenants of the Rand McNally Company for terms hereinafter itemized. Their two leases were assigned June 30, 1949 by that Company to Clark-Congress which, itself, executed other leases with Advertising Checking Bureau, Inc., and Merchants, as follows:

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1. Authority for this taking was set forth in the complaint, viz: Act of August 1, 1888, 25 Stat. 357 (U. S. C. title 40, sec. 257); Act of August 27, 1935, 49 Stat. 886 (U. S. C. title 40, sec. 304c), as amended by the Act of June 14, 1946, 60 Stat. 257 and the Federal Property and Administrative Services Act of 1949, approved June 30, 1949, 63 Stat. 377, as amended.

2. Clause 12 (T. R. 980) in the lease between Clark-Congress Corporation and the United States of America describes these documents.

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	Area		RAND-McNALLY—Lessor			CLARK-CONGRESS CORP.—Lessor		
			Period			Period		
Defendant	Floor	Sq. feet	Lease Dated	Commencing	Ending	Lease Dated	Commencing	Ending
Merchants:	8th	10,000 Room 844	May 19, 1949	June 16, 1949	Aug. 31, 1953	Apr. 27, 1951	May 1, 1951	Aug. 31, 1953
Advertising:	8th	20,000				Feb. 10, 1950	May 1, 1950	Apr. 30, 1955
Intertype:	10th	10,500	Nov. 19, 1948	Jan. 1, 1949	Dec. 31, 1958			

By its agreement dated June 22, 1951, Clark-Congress leased the entire Rand McNally Building to the United States of America, commencing January 1, 1952, and ending December 31, 1956, subject to extension and earlier termination. Clause 25 of that lease contains, *inter alia,* this wording: "This lease has been entered into by the parties in lieu of condemnation proceedings or an award therein, the Government having indicated that it was considering condemnation proceedings to acquire the rights herein granted to the Government."

At this juncture it is pertinent to parenthetically note that Rule 71A, and the amendment to Rule 81(a), Federal Rules of Civil Procedure, 28 U. S. C. A. became effective August 1, 1951 (341 U. S. 959, 962).

Under its declaration[3] of taking, filed December 12, 1951, coupled with a complaint in condemnation, the Government, pursuant to the request of the Administrator of General Services Administration, sought to acquire the right to use[4] and occupy space in the Rand McNally Building for the housing of federal agencies outside the District of Columbia. Merchants Matrix Cut Syndicate, The Advertising Checking Bureau, Illinois corporations, and Intertype Corporation, a New York corporation, each occupying various areas of the space involved were made parties defendant along with their lessor, Clark-Congress Corporation.[5]

3. For authority, Jess Larson, Administrator of General Services of the United States pleaded the: Act of August 1, 1888, 25 Stat. 357 (U. S. C. Title 40, sec. 257); Act of February 26, 1931, 46 Stat. 1421 (U. S. C. Title 40, secs. 258 (a) to 258 (e)); Act of August 27, 1935, 49 Stat. 886 (U. S. C. Title 40, sec. 304 (c)), as amended by the Act of June 14, 1946, 60 Stat. 257, and the Federal Property and Administrative Services Act of 1949, approved June 30, 1949, 63 Stat. 377, as amended.

4. Pursuant to the Act of August 27, 1935, as amended (U. S. C. title 40, sec. 304c).

5. Cross-claimants' Exhibit No. 1 consists of various documents issued by the Secretary of State of Illinois, concerning the dissolution of this corporate defendant. On December 27, 1951, the Secretary issued a certificate of dissolution.

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By exercising its sovereign power [*Kohl* v. *United States*, 91 U. S. 367 (1875)] of eminent domain, the Government acquired a quantum of interest described in its declaration and complaint, as being: ". . . . the right to use and occupy for a term of years commencing January 1, 1952, and ending December 31, 1956, extendible for an additional five-year term at the election of the United States, notice of which election shall be filed in the proceeding at least thirty (30) days prior to the end of the term thereby taken, together with the right to remove within a reasonable time after the expiration of the term or extension thereof any and all improvements and structures placed therein by or for the United States."

After the government moved for an order directing delivery of possession, defendants Merchants and Advertising each filed answers containing cross-claims against their landlord, co-defendant, Clark-Congress; Intertype also answered, but counterclaimed against that co-defendant landlord.

Since appeals numbered 11018, 11019 and 11020 contain a core issue common to all three, stemming from an interpretation of Rule 71A, Fed. R. Civ. Proc., 28 U. S. C. A., following § 2072, we will consider that problem first.

The trial court denied motions to strike the cross-claims and counterclaims interposed by the Government and Clark-Congress Corporation, their challenges to these pleadings being bottomed on a theory of non-conformity with subpart (e) of Rule 71A. Subsequently, Clark-Congress answered both cross-claims and counterclaim and, after a trial on the merits the judgment already mentioned was entered against Clark-Congress. Without a specific interdiction in Rule 71A against cross-claims or counter-claims we must decide if such pleadings may be presented, and claims asserted against co-party defendant Clark-Congress, in this condemnation case.

Rule 71A adopted pursuant to the Supreme Court's or
der,[6] dated April 30, 1951 (341 U. S. 962), abrogated para
graph 7 of Rule 81(a),[7] Federal Rules Civ. Proc., 28 U. S
C. A. "The Rules of Civil Procedure for the United State
District Courts govern the procedure for the condemnatio
of real and personal property under the power of eminen
domain," by the explicit terms of sub-paragraph (a) i
Rule 71A, "*except as otherwise provided in this rule.*"
Its contents are focused upon procedural steps and simpli
fied pleadings, without any mention of either counterclaim
or cross-claim.

This is a rule built upon an area formerly wanting i
uniformity (Report of the Advisory Committee on Federa
Rules of Civil Procedure Recommending Amendments,
F. R. D. 339, 357) and for which no specific provision had
been promulgated in the first set[8] of Rules of Civil Pro
cedure, effective September 16, 1938, 28 U. S. C. A., follow
ing § 723(c).

On June 10, 1947, the Advisory Committee, appointed by
the Supreme Court, reported (7 F.R.D. 503) a preliminary

6. Such rule-making power stems from the Enabling Act. Act
of June 19, 1934, c. 651, §§ 1, 2; 48 Stat. 1064, 28 U. S. C. §§ 723b,
723c.

7. Applicability of Federal Rules of Civil Procedure to con
demnation proceedings, was formerly regulated by this portion of
Rule 81, contained in its subparagraph (7): "In proceedings for
condemnation of property under the power of eminent domain,
these rules govern appeals but are not otherwise applicable."

8. "The Committee * * * drafted a Condemnation Rule which
appeared for the first time as Rule 74 of the April 1937 Draft
* * *" For various reasons "* * * the Advisory Committee in its
Final Report to the Court in November 1937 proposed that all of
Rule 74 be stricken and that the Federal Rules be made applicable
only to appeals in condemnation cases * * * the Committee pro
posed a rule 71A, on the subject of condemnation in its Prelim
inary Draft of May, 1944 * * * the amendments which the Court
adopted in December, 1946 did not deal with condemnation * * *."
7 F. R. D. 503, 512. See also: Report of the Advisory Committee
on Federal Rules of Civil Procedure Recommending Amendments,
5 F. R. D. 339, 357.

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draft of a proposed rule to govern condemnation cases. In their explanatory discussion (ibid, 514) this Committee noted that: ". . . Rule 71A will supply a uniform procedure to be used in all cases of condemnation suits invoking the national power of eminent domain and will supplant those statutes prescribing a different procedure, except where otherwise expressly so stated in the rule. Rule 71A is not intended to and does not supersede the Act of February 26, 1931, C. 307, §§ 1-5 (46 Stat. 1421), 40 U. S. C. §§ 258a-258e, which is a supplementary condemnation statute, permissive in its nature and designed to permit the prompt acquisition of title by the United States pending the condemnation proceedings upon a deposit into court."

Simply as indicative of their approach and perspective, we quote several passages from the Advisory Committee's commentary on Rule 71A, contained in their Report and transmitted with that Rule by Chief Justice Vinson to Congress:

> "The purpose of Rule 71A is to provide a uniform procedure for condemnation in the federal district courts, including the District of Columbia. To achieve this purpose Rule 71A prescribes such specialized procedure as is required by condemnation proceedings, *otherwise it utilizes the general framework of the Federal Rules where specific detail is unnecessary.* The adoption of Rule 71A, of course, renders paragraph (7) of Rule 81(a) unnecessary. * * * *" (11 F.R.D. 213, 238, 239). (Emphasis supplied.)
>
> "Since the general standards of pleading are stated in other rules, paragraph (2) (Rule 71A) prescribes only the necessary detail for condemnation proceedings * * * *" (id., 240)
>
> "* * * Departing from the scheme of Rule 12, subdivision (e) (Rule 71A) requires all defenses and objections to be presented in an answer and does not authorize a preliminary motion. There is little need for the latter in condemnation proceedings. The gen-

eral standard of pleading is governed by other rules, particularly Rule 8, and this subdivision (e) merely prescribes what matters the answer should set forth * * *" (id., 241)

"* * * A condemnation action is a proceeding in rem. Commencement of the action as against a defendant by virtue of his joinder pursuant to subdivision (c)(2) is the point of cut off * * *" (id., 242)

Plainly, Rule 71A simply blueprints uniform procedure[9] to be followed for this specific class of case. We are asked to approve adversary litigation among these co-defendants because Rule 71A(a) orders the applicability of "The Rules of Civil Procedure" and Rule 13,[10] thereof, authorizes counterclaims and cross-claims. In its *amicus curiae* brief, the Government[11] attaches such significance to this sentence: "No other pleadings or motion asserting any additional defense or objection shall be allowed," appear-

9. "...in 1931 it was said that there were 269 different methods of judicial procedure in different classes of condemnation cases..." 6 Nichols, Eminent Domain, 294 [§ 27.2(2)] citing the First Report of Judicial Council of Michigan (1931) § 46, pp. 55 ff.

Rule 71A supersedes the Conformity Act, 40 U. S. C. § 258. That statute treated with "practice, pleadings, forms and proceedings and not with matters of substantive laws." *U. S.* v. *243.22 Acres of Land, etc.*, 129 F. 2d 678 (2d Cir., 1942).

10. See e. g. *Douglas* v. *Wisconsin Alumni Research Foundation, et al.*, 81 F. Supp. 167 (N. D. Ill. 1948) on the compulsory counterclaim aspect and *Kauffman* v. *Kebert*, 16 F. R. D. 225 (W. D. Penn. 1954). Judge Lindley, of our court discussed jurisdictional problems stemming from counterclaims in *Carter Oil Co.* v. *Wood*, 30 F. Supp. 875 (E. D. Ill. 1940); *Lesnick* v. *Public Industries Corp.*, 144 F. 2d 968 (2d Cir. 1944).

Governmental Immunity From Counterclaims is treated by a note in 50 Col. L. Rev. 505 (1950); See also: Shulman and Jaegerman, Some Jurisdictional Limitations in Federal Procedure, 45 Yale L. J. 393, 410 (1936); A. M. Dobie, The Federal Rules of Civil Procedure, 25 Col. L. Rev. 261, 267 (1939).

11. Motions to strike parts of the answers, and cross-claims of Merchants and Advertising, and Intertype's counterclaim, were filed by the Government below.

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ing in paragraph (e) of Rule 71A (341 U. S. 959, 966). That sentence comes from the portion of Rule 71A treating with defendant's appearance or answer. If a defendant, in a condemnation proceeding has "any objection or defense to the taking of his property" he must set up such matters in his answer. Merchants, Advertising and Intertype tacked their respective cross-claims and counterclaim to individual answers containing defensive allegations and statements of objections. But we think their asserted claims against Clark-Congress must be viewed and tested independently of any other associated pleadings they filed. For if these three claims are out of place in this condemnation case their status is neither improved nor strengthened by mere incorporation in answers. We are aware of a historical antipathy toward mixing different kinds of actions in one proceeding. Our current view is incompatible with those expressed in *United States* v. *76.15 Acres of Land, More or Less, etc.*, 103 F. Supp. 478 (N. D. Calif. 1952) where cross-claims were rejected in an action for condemnation, because the California court thought the difference between a proceeding *in rem* and one *in personam* warranted such a ruling. But we think that solution rests upon an issue stated with deceptive conceptual simplicity.[12]

12. An interesting sidelight, here, is supplied by this colloquy during Proceedings of the Institute on Federal Rules, July 21 to 23, 1938, upon considerations of Rule 13:

"Mr. J. R. Keaton: * * * Does that mean that if A should sue B for tort, an automobile accident, we will say, that B might come back with a promissory note and adjust that in the same suit?

"Mr. Clark (then Dean, Yale University School of Law, Reporter to the Supreme Court Advisory Committee): It certainly does."

"Mr. Keaton: All of the claims whether involving a contract or tort, can be settled in the same suit?

"Mr. Clark: Yes. * * *"

Speaking of freely filing counterclaims, Dean Clark continued: "* * * Why should you require, for example, that a party should

We have no precise authoritative indication that the Supreme Court, exercising its rule-making power, wished to countenance a determination of such claims, as are now before us, in eminent domain cases, unless it be said that the solution lies in the introductory paragraph (a) to Rule 71A. Cross-claims against co-defendants are so rare in condemnation cases we doubt if such matters were even considered in preparing Rule 71A. Yet, we are confronted with an express direction, in paragraph (a), seemingly giving full play to other Rules of Civil Procedure, "except as otherwise provided" in Rule 71A. Silence of this latter Rule makes it necessary to examine Rule 13 under which Merchants, Advertising and Intertype seek shelter.

At the threshold we record our further awareness that Rule 13 would prevent circuity of actions and multiplicity of suits, indeed these were among the prime reasons stimulating its adoption; practicality, however, is the true taproot of Rule 13. We are cited to *Collier* v. *Harvey*, 179 F. 2d 664 (10th Cir. 1949) where Chief Judge Phillips discussed the broad sweep of Rule 13(g), but not in relation to Rule 71A. *Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593 (1926) is also brought to our attention for an interpretation of "transaction" announced by the Supreme Court upon examination of former Equity Rule 30, from which Rule 13 was derived. Close scrutiny of facts and circumstances involved in various other opinions relied

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pay $5,000 on a promissory note when he is sued and is soon going to collect $5,000 on a tort? Why shouldn't you settle it all at one time and have it ended?" Regarding (g) Dean Clark remarked, *inter alia*, "* * * one defendant may make a cross-claim against another defendant. Fed. Rule Civ. Proc. Proceedings of the A. B. A. Inst., Cleveland, 1938, pp. 248 ff.

After Dean Clark's appointment to the Second Circuit Court of Appeals he authored an article entitled Special Problems In Drafting And Interpreting Procedural Codes And Rules, 3 Vand. L. Rev. 493, 497 (1950) in which he ventilates some of the notions to which we refer.

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on by Merchants, Advertising and Intertype show they each fail to bridge the gap between Rule 13 and Rule 71A, especially since Rule 71A was adopted subsequent to the promulgation of Rule 13. Descriptions of attributes and inherent characteristics of Rule 13 furnish little aid in determining if a trial judge hearing eminent domain proceedings has jurisdiction to dispose of co-defendants' cross and counter-claims. Only by inserting a judicial rubric in Rule 71A could we interpret it as containing some lurking prohibition against invoking Rule 13. We read that Rule as it is written.[13] Empirical judgment inclines us away from letting Rule 13 become operative in these proceedings, but we refrain from invading the rule-maker province or from fashioning policy.

By resolving contentions raised against applying Rule 13 to condemnation cases we come to the contents of these three claims and evidence introduced in support of them. Merchants, Intertype and Advertising postulate theories of conspiracy among and between, the Government, General Services Administration and Clark-Congress, as an apparatus for the condemnor to prematurely terminate those three tenancies derived from Clark-Congress, lessor. Cohesive substance for this plot, they allege, is supplied by the June 1951 lease between Clark-Congress and the Government, despite a clause, therein reciting that this lease was in lieu of condemnation. In short, these three claimants are unable to envisage consensual transactions in connection with condemnation proceedings. See: *U. S.* v. *Certain Parcels of Land, etc.*, 345 U. S. 344, 348 (1953); See also: *U. S.* v. *Carmack*, 329 U. S. 230, 243 (1946). But all titles to, and interests in, lands are held subject to the sovereign power of eminent domain. *Goodyear Shoe Ma-*

13. e. g. Chief Judge Biggs held that Rule 52 applied to federal condemnation cases in *United States* v. *Certain Parcels of Land in Philadelphia*, 215 F. 2d 140, 145 (3rd Cir. 1954).

chinery v. *Boston Terminal Co.*, 176 Mass. 115, 57 N. E. 214 (1900). Certainly, the Government's need for quarters shaped itself in obedience to currents other than those flowing from a plot with Clark-Congress. Indeed, these claimants do not go so far behind this taking, by urging a conspiracy to activate the Government power of eminent domain. What they describe equates to an arrangement whereby Clark-Congress leased their spaces, in the Rand-McNally Building, to the Government, so that when the sovereign thus became a co-tenant, with them, it could embark on "a course of harassment, pressure and threats" looking toward compelling these three tenants to abandon or surrender possession. Relying on that pattern, sketched in their pleadings, each claimant urges breaches and violations of covenants of quiet enjoyment and peaceable possession because Clark-Congress, allegedly, ratified, sanctioned and acquiesced in the Governmental acts culminating with instituting this condemnation case. Regardless of how it is articulated each such pleading reverts to, and each is bottomed on, claiming damages because these three tenants had to find quarters elsewhere, and move. Whether the ultimate theory of recovery against Clark-Congress is conveniently blurred in the pleadings or evidence is now beside the mark, since a declaration of taking was filed and processed. Merchants, Intertype and Clark-Congress were entitled to just compensation[14] and no more under U. S. Const. Amend. V. See: *United States* v. *General Mo-*

14. Verdicts of the jury were as follows:

"For the taking of the leasehold estate of Intertype Corporation * * * $131,500.00." "For the taking of the leasehold estate of Merchants Matrix Cut Syndicate, Inc. * * * the sum of $43,750.00."

Our previous opinion, *United States* v. *Advertising Checking Bureau*, 204 F. 2d 770 (7th Cir. 1953), concerned the condemnation clause in Advertising's lease with Clark-Congress and we then held the trial judges ruling, that Advertising was entitled to no award, was correct.

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tors Corp., 323 U. S. 373, 382 (1945). Their interests were acquired by and to the extent of that declaration of taking. 46 Stat. § 1421; 40 U. S. C. §§ 257-258. Consequently their attempts to isolate some fragment of the total acquisition process carries compensation beyond the bounds delineated in the Fifth Amendment. Governmental taking of private property for public use requires payment of just compensation to Merchants, Intertype and ordinarily to Advertising,* but these three tenants cannot improve on the amount of compensation by taking damages from their landlord.[15] It would be a strange index of the compensatory redress for the acquisition of private property through eminent domain proceedings to allow these three tenants recovery from their landlord for moving, packing and other expenses.

Their landlord, Clark-Congress, moved for a new trial pursuant to Rule 59, Fed. R. Civ. Proc., 28 U. S. C. and by appropriate motion under Rule 52(b) Fed. R. Civ. Proc. 28 U. S. C. A., sought to have the trial judge amend his findings of fact; at the same time stating objections to the recorded findings. Both motions were overruled. While the challenged findings are detailed, they are estranged from significant items of evidence disclosed by this record. Of course, we are not now retrying issues of fact nor trenching upon the province allotted a trier of facts below. But we do think that the findings, *inter alia*, which

* This tenant, of course, covenanted away its right to compensation as we hereinafter point out.

15. In his findings of fact, the trial judge, stated that "actual damages" suffered were as follows:

Merchants	$44,027.91
Intertype	41,498.98
Advertising	96,949.78

These damages were awarded to each claimant respectively because "the uncontradicted evidence in this case shows that each claimant suffered the aforesaid actual damages by reason of the wrongful acts of Clark-Congress Corporation," and three separate judgments entered accordingly.

exhibit computations of damages predicated upon the "cost of moving out" of the premises in question, flow from errors of law impairing the three judgments against Clark-Congress. Moving expenses are so inextricably woven into the termination of these leases upon the taking of the Government [*U. S.* v. *Advertising Checking Bureau*, 204 F. 2d 770, 772 (7th Cir. 1953)] that they cannot be recovered indirectly, or on the side.

Various elements itemized by the trial judge in his findings of "actual damage," and underlying the three judgments he entered against Clark-Congress, bear striking resemblance to those which the respondent in *United States* v. *General Motors Corp.*, 323 U. S. 373, 376 (1945) offered to prove on the issue of compensation from the Government. But such costs were not there tendered in support of a claim against a co-defendant landlord in Clark-Congress' position here. Moreover, only Intertype's lease, by its terms, extends beyond December 31, 1956; leases of Merchants and Advertising would have expired prior to that date. At this juncture we might well recall the Government pleading stating that its interest, acquired through condemnation was to be "* * * extendible for an additional five-year term * * *", after December 31, 1956.

Speaking for the majority in *United States* v. *Westinghouse Co.*, 339 U. S. 261, 263-264 (1950), Mr. Justice Frankfurter carefully delimited the holding of *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945) and stated, *inter alia:*

> "When there is an entire taking of a condemnee's property, whether that property represents the interest in a leasehold or a fee, *the expenses of removal or of relocation are not to be included in valuing what is taken.* That rule was found inapplicable to the new situation presented by the *General Motors* case—inapplicable, that is, where what was to be valued was a right of temporary occupancy of a building equipped

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for the condemnee's business, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use * * *."

Petty Motor (*U. S.* v. *Petty Motor Co.*, 327 U. S. 372 (1946) made clear that the taking of the whole of a tenant's lease does not fall within the *General Motors doctrine* * * *".

Mirrored against these enunciations of basic principles, there emerges strong implications that Merchants, Intertype and Advertising were attempting to recover from Clark-Congress for items not compensable by the sovereign. Advertising was precluded from governmental compensation for the reasons we discussed in *United States* v. *Advertising Checking Bureau, Inc.*, 204 F. 2d 770 (7th Cir. 1953). And, Intertype argues (its brief, 46), as we just said, that such costs were not included in its award. Of course, Intertype's reasoning may explain why it pursues Clark-Congress, but that is hardly legalistic support for such cross-claim. Furthermore, as between Intertype and the Government, "An award based on removal costs will of course be delayed until it is known whether the Government's occupancy has exhausted the tenant's leasehold." *United States* v. *Westinghouse Co.*, 339 U. S. 261, 268 (1950).

All too frequently, profit seeking motives creep into condemnation cases. This observation, no doubt, will be distasteful to those who envisage the public treasury as fair game in such proceedings. Though competitive existence in our society may stimulate such desires, just compensation, only, remains the yardstick in eminent domain proceedings. *Kimball Laundry Co.* v. *United States*, 338 U. S. 1 (1949), 7 ALR 2d 1280. When the Treasurer disburses compensation in obedience to an order of award, based on condemnation proceedings, public dollars stand in lieu of

land, premises or interests, so acquired, and thereafter devoted to public use. "The Constitution and the statutes," Mr. Justice Reed noted, delivering the majority opinion in *United States* v. *Petty Motor Co.*, 327 U. S. 372, 377 (1946), "do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken."

A recital of various other pieces and portions of evidence, disclosed by this record, is unnecessary to this opinion because we think *United States* v. *Petty Motor Co.*, 327 U. S. 372 (1946); *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945); *United States* v. *Westinghouse*, 339 U. S. 261 (1950) contain the law applicable to, and determinative of, the major points raised by the Government's appeal in case number 11017. We think those three cited cases are the benchmarks by which the trial court should be guided on this remand.

Since condemnation juries are impaneled only for deciding compensation they commence deliberations in a positive awarding-state-of-mind. An especially delicate equilibrium, acutely sensitive to factors influencing the quantum of award, is present throughout such trials. Perhaps we are underscoring the obvious, but it is our opinion that the jurors' critical and difficult function, here, should not be further complicated by blurred and insufficient instructions or by improper arguments. [See e. g.: *United States* v. *Miller*, 317 U. S. 369, 381 (1943); *Ramming Real Estate Co.* v. *United States*, 122 F. 2d 892 (8th Cir. 1941)] concerning and pointing up deposits made by the Government pursuant to statute.

The judgments in case number 11017, are reversed and remanded to the District Court for a new trial and proceedings consistent with the views expressed in this opinion.

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Each judgment entered on the respective cross-claims of Merchants Matrix Cut Syndicate, Inc., and Advertising Checking Bureau, Inc., and on the counterclaim of Intertype Corporation, being appeals numbered 11018, 11019 and 11020, is hereby reversed and remanded to the District Court with directions to sustain[16] the three motions of Clark-Congress Corporation to strike each cross-claim and the said counterclaim.

Reversed and Remanded with directions.

SWAIM, *C. J.* I concur in the result.

16. Intertype states, in the argument portion, of its brief (p. 17) in Case No. 11018: "In order to protect their rights in the event that the counterclaims and cross-claims should be disallowed in this case, and in order to avoid the running of the statute of limitations both as to filing of claims and the two-year limitation for bringing action against Clark-Congress Corporation which was voluntarily dissolved on December 27, 1951 * * * the defendant tenants have filed similar claims against Clark-Congress Corporation and the Government under the Federal Tort Claims Act as noted at the bottom of page 14 of the Government's * * * brief."

The marginal note in the *amicus curiae* brief filed by the Government in Nos. 11018, 11019, 11020, follows: "Another possible basis for financial interest of the United States in these cases arises from the fact that similar claims have been asserted under the Federal Tort Claims Act and are now pending in the court below. (p. 14.)

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois.

Monday, January 17, 1955.

Before

Hon. Philip J. Finnegan, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge

The United States of America, *Plaintiff-Appellant,* vs. Merchants Matrix Cut Syndicate, Inc., and Intertype Corporation, *Cross-Claimants-Appellees.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 11017	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said district court for a new trial and proceedings consistent with the views expressed in the opinion of this court filed this day.

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UNITED STATES COURT OF APPEALS

FOR the Seventh Circuit

Chicago 10, Illinois.

Monday, January 17, 1955.

Before

Hon. Philip J. Finnegan, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge

Intertype Corporation,
Cross-Claimant-Appellee,
No. 11018 *vs.*
Clark-Congress Corporation,
Cross-Defendant-Appellant;
Merchants Matrix Cut Syndicate, Inc.,
Cross-Claimant-Appellee,
No. 11019 *vs.*
Clark-Congress Corporation,
Cross-Defendant-Appellant;
The Advertising Checking Bureau, Inc.,
Cross-Claimant-Appellee,
No. 11020 *vs.*
Clark-Congress Corporation,
Cross-Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern division.

This cause came on the heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgments of the said district Court

entered on the respective cross-claims of Merchants Matrix Cut Syndicate, Inc., and Advertising Checking Bureau, Inc., and on the counter-claim of Intertype Corporation, being appeals numbered 11018, 11019 and 11020, is hereby reversed, with costs against appellees, and that these causes be, and the same are hereby, remanded to the said District Court with directions to sustain the three motions of Clark-Congress Corporation to strike each cross-claim and the said counterclaim.

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois.

Wednesday, February 23, 1955.

Before

Hon. Philip J. Finnegan, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge
Hon. H. Nathan Swaim, Circuit Judge

The United States of America,
Plaintiff-Appellant,
No. 11017 *vs.*
Merchants Matrix Cut Syndicate, Inc., et al.,
Cross-Claimants-Appellees;
Merchants Matrix Cut Syndicate, Inc.,
Cross-Claimant-Appellee,
No. 11019 *vs.*
Clark-Congress Corporation,
Cross-Defendant-Appellant;
The Advertising Checking Bureau, Inc.,
Cross-Claimant-Appellee,
No. 11020 *vs.*
Clark-Congress Corporation,
Cross-Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the court that the petition for a rehearing of this cause be, and the same is hereby, denied.